

**UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA**

LANDMARK LEGAL FOUNDATION  
19415 Deerfield Ave, Ste. 312  
Leesburg, VA 20176

Plaintiff,

vs.

ENVIRONMENTAL PROTECTION AGENCY  
1301 Constitution Ave, NW  
Washington, DC 20004

Defendant.

Case No. 1:12-cv-01726 (RCL)

**PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION FOR AN EXTENSION OF  
TIME TO FILE MOTION FOR SUMMARY JUDGMENT AND TO AMEND  
SCHEDULING ORDER**

Plaintiff Landmark Legal Foundation (“Landmark” or “Plaintiff”) submits this opposition to Defendant Environmental Protection Agency’s (“EPA” or “Defendant”) Motion for an Extension of Time. For reasons stated below, Landmark objects to extending the deadline to May 15, 2013.<sup>1</sup>

Nearly nine months have passed since Landmark submitted a Freedom of Information Act (“FOIA”) request seeking records related to communications between EPA officials and outside third parties regarding final issuance of pending rules or regulations. Landmark sought expedited production of requested agency records because it appeared from published reports

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<sup>1</sup> In its Motion, Defendant requests an extension to May 15, 2013 to file its Motion for Summary Judgment. Defendant’s Third Motion For An Extension Of Time. Defendant’s Proposed Order, however, extends this deadline until June 7, 2013. Defendant’s Third Motion For An Extension Of Time, Proposed Order.

that political calculations were improperly influencing EPA's operations. Moreover, Landmark sought requested records in order to ensure a full public record concerning the legality and propriety of pending regulations.

From the outset, however, EPA has delayed, obfuscated, and otherwise acted to frustrate Landmark's FOIA rights and the public's right to full information of EPA's conduct. This motion is the latest effort at delay.

Landmark and EPA agreed to a production and scheduling order proposed by EPA and signed by the Court on January 19, 2013, requiring EPA to produce responsive records by February 7, 2013 and February 27, 2013 (for documents to be reviewed by the Executive Office of the President) respectively. Landmark consented to an additional production on March 14, 2013 (but was not asked for and did not agree to any corresponding delay in the briefing schedule). The order provided for a "meet and confer" period and, in the absence of agreement regarding withholdings, required EPA to file any dispositive motions on or before March 30, 2013. On April 3, 2013, the Court denied Defendant's motion for an extension of time until May 15, 2013 and ordered the Defendant's Motion for Summary Judgment to be filed no later than April 30, 2013. On April 12, 2013, Defendant provided to Landmark a "final" production.

Plaintiff and Defendant have been in contact in an effort to narrow the issues for resolution at the summary judgment phase. Plaintiff has informed Defendant of a number of deficiencies in the scope of EPA's search for responsive records and improper assertions of disclosure exemptions.

The issues for resolution at the next stage of this litigation are already crystallized. Landmark has notified Plaintiff of its objections and anticipates Defendant's motion for

summary judgment, accompanying affidavits/declarations and Vaughn index will address these matters.

EPA's conduct to this point in the litigation does not sanction additional delay. For example, in its initial production, dated February 7, 2013, EPA redacted the email address of former Administrator Lisa Jackson, asserting spuriously FOIA exemption (b)(6) (personal privacy). 5 U.S.C. 552(b)(6). EPA's index of redactions (provided contemporaneously with this production) reflected this assertion. EPA continued to assert this exemption in later productions, not only for the former Administrator, but for other current and former Obama Administration officials. In a subsequent redaction index provided on February 27, 2013, EPA again redacted former Administrator Jackson's email address.

Landmark was forced to expend considerable resources in the form of attorney's time establishing legal arguments to rebut this exemption. Without notice or explanation, however, EPA removed this exemption the third of one of the three indexes provided on March 14, 2013. It was only through careful examination of a redaction index that appeared to be unchanged did Plaintiff discover this significant change in EPA's position. When notified of the removal, Defendant agreed to remove all redactions pertaining to former Administrator Jackson's email address. In a subsequent "final production" dated April 12, 2013, EPA released in full a number of records relating to the secondary email account of the former Administrator.<sup>2</sup>

In its Motion, EPA --without elaboration -- justifies extending deadlines, stating "in the process of finalizing the pleadings, EPA determined that another search [for responsive records]

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<sup>2</sup> EPA has produced responsive records on four occasions -- February 7, 27 and March 14, and April 12, 2013 respectively. In each instance, EPA provided an index documenting its exemptions and withholdings. In the initial production, the index was 64 pages. In the February 27<sup>th</sup> production, EPA provided two separate indexes one identical to the 64 page initial index and another index totaling 12 pages. In the March 14 production EPA provided three indexes. The first two indexes were identical to the previous indexes provided. The third index was identical to the 12 page index previously with the exception that the (b)(6) redaction for the former Administrator was removed.

is required and that there are a number of additional documents that may potentially be responsive to the Plaintiff's request." Landmark is unmoved. EPA has drawn out this production for nearly nine months and has had ample time to locate and produce responsive records. Landmark is a small organization with limited resources whose resources are stretched by EPA's obstinate conduct in this case. Additional delay will work an unwarranted burden on Plaintiff.

Finally, when the parties reached the initial deadline agreement, both entities were well aware of the scope of Landmark's FOIA request and the type of agency records Landmark seeks. Landmark is convinced that EPA's repeated "discovery" of additional "potentially responsive" records will go on ad infinitum.

For these reasons, Plaintiff requests that Defendant's Motion for extension of time be denied.

Respectfully submitted,

Landmark Legal Foundation

DATED: May 1, 2013

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**CERTIFICATE OF SERVICE**

Undersigned counsel hereby certifies that a true and accurate copy of the foregoing Memorandum of Points and Authorities In Support of Plaintiff's Preliminary Injunction was filed electronically with the Court by using the CM/ECF system on this 1<sup>st</sup> day of May, 2013. Parties that are registered CM/ECF users will be served by the District Court's CM/ECF system.

/s/ Michael J. O'Neill  
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